Supreme Court, U.S.
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No. 95-1908

In The

Supreme Court of the United States

October Term, 1995

TELECONCEPTS, INCORPORATION,

Petitioner,

vs.

MCI TELECOMMUNICATIONS CORPORATION and BELL OF PENNSYLVANIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BELL OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by Petitioner do not appropriately state the issues presented. If certiorari is granted, the Court should consider the following regarding those issues pertaining to Bell of Pennsylvania:

1. Whether the Third Circuit Court of Appeals properly held that under the doctrine of "exclusive primary jurisdiction", resolution of the modified liability argument of the Third-Party Plaintiff rested with the Pennsylvania Public Utility Commission.

2. Whether the Third Circuit Court of Appeals properly remanded the matter to the District Court for referral to the Pennsylvania Public Utility Commission as Petitioner raised the issue of inadequacy of the utility's services as the heart of Petitioner's liability claim for the first time at oral argument.

3. (As the third issue is directed against MCI, same will not be addressed by this Respondent.)

LIST OF INTERESTED PARTIES

In addition to those parties listed in the caption, pursuant to Supreme Court Rule 29.6, Bell of Pennsylvania's parent corporation is Bell Atlantic Corporation. There are no subsidiaries of Bell of Pennsylvania, wholly or nonwholly owned. Additionally, since the filing of the Third-Party Complaint, Bell of Pennsylvania's new corporate name is Bell Atlantic-Pennsylvania, Inc.

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Rules Cited:

Supreme Court Rule 10 6

Federal Rule of Civil Procedure Rule 56 9

Other Authority Cited:

Bell of Pennsylvania Tariff § 18(A)(2)(j) 1, 3

STATEMENT OF JURISDICTION

Petitioner alleges that the entry of the Third Circuit Court of Appeals' mandate on December 8, 1995 gives rise to the Allowance of this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254.

Petitioner alleges subject matter jurisdiction for the Complaint and Third-Party Complaint was based on 28 U.S.C. § 1331 and 1337. However, appropriately, the Third Circuit Court of Appeals determined that the only basis for subject matter jurisdiction over the Third-Party Complaint was that supplementally conferred by 28 U.S.C. § 1367 and Petitioner has not sought to challenge same. To the extent that the Petitioner has not raised the appropriate grounds for jurisdiction, Respondent objects as to subject matter jurisdiction.

STATUTES AND RULES INVOLVED

Bell of Pennsylvania Tariff § 18(A)(2)(j):

> The COCOT Service subscriber is considered as the Customer of Record and is responsible for all rates and charges associated with the service, including but not limited to the installation and rates for the Pay station-COCOT Access Line, COCOT Service-Blocking and Screening Options, directory assistance changes, message toll charges and local usage charges. The COCOT Service subscriber shall not be responsible for message toll charges for improperly or erroneously accepted third number billed or credit card calls if the Pay station-COCOT Access Line is arranged with

the COCOT Service Blocking/Screening Option.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Initially Teleconcepts, Inc. (hereinafter referred to as "TCI") was sued by MCI, its long distance carrier, for approximately $49,000 in long distance phone calls to various countries outside of the continental United States. Bell of Pennsylvania's alleged involvement was as the provider of the lines for persons to make these calls. TCI alleged that this was a breach of contract, namely the requests for service, which would render Bell of Pennsylvania somehow liable.

Assuming *arguendo*, that some time in December, 1989, TCI became aware of excessive charges for long distance phone calls, TCI would have been able to file a formal Complaint with the Public Utility Commission of the Commonwealth of Pennsylvania on or before December, 1992. However, instead, TCI filed a Third-Party Complaint with the United States District Court for the District of New Jersey, alleging very simply that there was a breach of contract by Bell of Pennsylvania. TCI blanketly asserted that the contract was that which gave rise to service requests for these Customer-Owned Coin-Operated Telephones (COCOTs) and supplied documents purporting to be same. Assuming *arguendo* that those documents provided by TCI were in fact contracts, Bell of Pennsylvania filed a Motion for Summary Judgment which was appropriately granted by the District Court of New Jersey. At no time was defective equipment alleged.

TCI's written appeal to the Third Circuit Court of Appeals with regard to Bell of Pennsylvania was whether there existed a

genuine issue of material fact below, such that summary judgment was not appropriate. Although TCI's argument was never quite clear below, it at no time made the allegation that Bell of Pennsylvania's service was inadequate or that it challenged the actual provisions of Bell of Pennsylvania's Tariff, specifically, Section 18(A)(2)(j).

Once, however, oral argument began, TCI informed the court it was challenging the reasonableness, adequacy and sufficiency of Bell's telephone service, for the first time although same was not pled in the body of the Third-Party Complaint. (Op. at 28-29.)

Based then upon the Petitioner's novel theory, the Third Circuit Court of Appeals, *sua sponte*, appropriately determined that exclusive primary jurisdiction vested in the Pennsylvania Public Utility Commission for the determination of whether service was reasonable and/or adequate. It is important to note that neither the District Court nor the Circuit Court of Appeals decided any part of its opinion based upon an allegation of defective "equipment."

As a result of the Court's *sua sponte* request for delineation of the doctrine of primary jurisdiction, and supplemental briefs thereto, it then reversed the District Court's Order granting summary judgment in favor of Bell of Pennsylvania and additionally remanded the matter to the District Court for liability disposition by the Pennsylvania Public Utility Commission.

The Circuit Court of Appeals painstakingly distinguished and defined the legal issues at the heart of this claim by TCI. Furthermore, despite granting TCI almost every possible indulgence under the law, and despite Petitioner's inartful

pleadings, the result of the matter was for the District Court, at that point, to advise TCI to file a formal Complaint with the Public Utility Commission. To this date, Respondent is unaware of any formal Complaint made to the Pennsylvania Public Utility Commission and as such Petitioner has not exhausted its administrative remedies.

B. Correction of Misstatements in the Petition.

At no time, as alleged by Petitioner in its request for Writ of Certiorari, did the initial Third-Party Complaint against Bell of Pennsylvania ever allege defective equipment. This is not a products liability case. There was, however, an oral allegation of defective service raised before the Third Circuit Court of Appeals when TCI, there the Petitioner as well, asserted that the service it received from Bell of Pennsylvania was inadequate. As TCI never pled nor raised defective equipment as part of its suit, same cannot be raised now and therefore should be deemed waived.

TCI, moreover, states that no argument was ever made by Bell of Pennsylvania with regard to the Public Utility Commission's jurisdiction. As discussed, when given the opportunity to be heard, Bell of Pennsylvania argued same after TCI modified its argument to the Court of Appeals. To submit that Bell of Pennsylvania made no argument would be a misstatement to say the least, as it overlooks not only the pleadings in the case, but also the Third Circuit's directive for supplemental briefs on the issue of primary jurisdiction. Petitioner also misstates the lack of a mechanism for sending this matter before the PUC, which will be dealt with *infra*. However, in the same blanket misstatement, the Petitioner not only speculates as to what the PUC might do, but also insinuates that Bell of Pennsylvania is somehow "expert" in these matters, thus rendering any comment made by Respondent as authoritative of

the PUC's disposition. Such is not the case. At all times relevant hereto, TCI not only should have known the law relevant to its alleged claim, but had also been made aware of same through the filing of the pleadings in this case. To now argue surprise is not only inappropriate, but deceptive to the Court.

Petitioner has raised that Bell of Pennsylvania informed the Court of Appeals that the TCI was out of time to file an original application. In fact, the matter was raised by the District Court upon remand as to what the next step should be. The District Court advised TCI to file a written Complaint with the Pennsylvania Public Utility Commission to make a determination as to whether or not the statute of limitations had run. No such Complaint was filed by the Petitioner, failing again to exhaust administrative remedies. Even if the matter would be time barred pursuant to 66 Pa.C.S.A. § 3314, said time would have run prior to Third-Party Plaintiff's filing of the Third-Party Complaint on June 7, 1993.

Additionally, in conjunction with its claim now for defective equipment, TCI asserts that the switches used within the COCOTs were somehow Bell of Pennsylvania manufactured. The record not only lacks foundation for this assertion, but demonstrates that it is incorrect.

TCI, also, states that MCI supplies the bills for the long distance calls. TCI's own discovery responses show that the MCI charges are contained within the monthly bills submitted to the customer by Bell of Pennsylvania. Petitioner further errs by commenting that the Third Circuit held that "Bell's cause of action" arose pursuant to 47 U.S.C. § 415(e). Truthfully, the court's holdings were with regard to MCI, as it brought the claim. Although these may not have any bearing on the issues presented, they nevertheless are factual misstatements.

REASONS FOR DENYING THE WRIT

I.

THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE DOCTRINE OF EXCLUSIVE PRIMARY JURISDICTION.

Initially, it should be noted that in support of its Petition for Allowance of the Writ of Certiorari, TCI at no time asserts any of the Rule 10 criteria for granting certiorari: that there is a split of decisions among the Circuit Courts on this issue; that it represents an issue of such federal magnitude that this Court must address it; or, that the Third Circuit deviated from the norm such that this Court must intervene. Without having supported any of those contentions, certiorari should not be granted.

Petitioner submits, inappropriately, that the Court of Appeals raised the issue of primary jurisdiction *sua sponte* in the absence of any argument by Bell of Pennsylvania that the Pennsylvania Public Utility Commission had jurisdiction. Instead, Bell of Pennsylvania, steadfastly maintained through its affirmative defenses, that primary jurisdiction did not vest in the District Court for the State of New Jersey. Appropriately, the Circuit Court of Appeals raised the issue of primary jurisdiction when the Petitioner changed its direction of attack by then asserting that the service provided by Bell of Pennsylvania was inadequate or defective. The Court of Appeals has the power to determine primary jurisdiction *sua sponte* and appropriately exercised its discretion.

Petitioner cites the Circuit Court of Appeals' opinion and conveys that the court may simply stay a case during a referral to an administrative agency. Petitioner then again made a blanket misstatement by asserting that there is now no way to invoke the

primary jurisdiction doctrine since it would require referral to a state agency without any mechanism having been in place by any federal court for such referral. This assertion is blatantly incorrect. First and foremost, the courts have already invoked the primary jurisdiction doctrine. Second, much as in cases of abstention, the lower court would simply stay the damages determination of the matter until the liability determination could be made by the appropriate administrative agency, in this case the Pennsylvania Public Utility Commission. There is in fact authority for referral to a state agency by a Federal Court much as the Third Circuit Court of Appeals pointed out in *Greate Bay Casino & Hotel v. Tose*, 34 F.3d 1227 (3d Cir. 1994). The doctrine of exclusive original jurisdiction was never misapplied by the Third Circuit Court of Appeals. That the statute of limitations may have run before the Public Utility Commission is not an argument which should affect the Court's decision in any way. At oral argument TCI modified its position to circumvent the summary judgment already entered against it. To now cry "foul" when its new claim still might not give it the outcome it desires, does not entitle TCI to yet another bite at the apple.

As Petitioner continues to change its cause of action and hence its argument, it has essentially waived the right to appeal the question of whether Bell of Pennsylvania breached any contract, and furthermore has waived the issue of whether the service was defective as now the claim is for defective equipment, same of which was never provided by Bell of Pennsylvania and which the Circuit Court of Appeals duly noted. The only issue currently before this Court as was decided by the Circuit Court of Appeals was whether the Pennsylvania Public Utility Commission has exclusive primary jurisdiction in matters involving one of its public utility's service, and the adequacy and reasonableness thereof. Appropriately, the Third Circuit Court of Appeals decided that the Pennsylvania Public

Utility Commission did in fact have exclusive primary jurisdiction and accordingly applied the appropriate federal and state law. *See, e.g., Greate Bay, supra*; *Elkin v. Bell Telephone*, 491 Pa. 123, 420 A.2d 371 (1980).

As even this Court has previously decided that exclusive primary jurisdiction rests within the administrative body which the legislature has empowered to decide these matters, there is no need to revisit the question. *See Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). Additionally, there seems to be no split of decisions amongst the Circuit Courts with regards to this issue, as was detailed by the Third Circuit of Appeals in its fastidious opinion.

II.

THE THIRD CIRCUIT COURT OF APPEALS APPROPRIATELY REMANDED THE MATTER FOR DISPOSITION BY THE PENNSYLVANIA PUBLIC UTILITY COMMISSION.

Upon the conclusion of oral argument and in its opinion, the Third Circuit Court of Appeals correctly noted that the matter should be remanded to the District Court for a hearing by the Pennsylvania PUC. TCI alleges now that there is no mechanism for allowing said referral and as such the Court of Appeals erred. In fact, the appropriate route is for the District Court to stay the matter, as it did, to await disposition by the PUC. At the point of the bifurcation, which is provided for under Pennsylvania state law and has been supported by case law, the administrative agency should determine the liability portion of the matter.

Unfortunately for TCI, it did not follow the District Court's directive to file a formal written complaint with the PUC, which

is the mechanism appropriate in both the state and federal courts. Instead, TCI chose to file this Petition for a Writ of Certiorari. It would be speculative to assert what the PUC's decision would be, as was suggested by the District Court. However, as was already known to all parties during the course of this litigation, 66 Pa.C.S.A. § 3314 provided a three year statute of limitations. Had the PUC determined that TCI's claim was time barred, then the remedy at the federal court level would be to entertain and approve a motion pursuant to 28 U.S.C. § 1367(c) to dismiss for lack of jurisdiction, as well as a Rule 56 Motion.

CONCLUSION

This Honorable Court should deny the Petition for the Writ of Certiorari.

Respectfully submitted,

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